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Ramada Plaza Hotel ***and*** **Local 758, Hotel & Allied Services Union, SEIU, AFL–CIO.** Cases 29–CA–25181 and 29–CA–25501

February 27, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 17, 2003, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a limited exception, to which the Respondent filed an answering brief. The General Counsel also filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Ramada Plaza Hotel, Corona, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances and promising or granting benefits to its employees for the purpose of dissuading them from voting for or supporting Local 758, Hotel and Allied Services Union, SEIU, AFL–CIO, or any other labor organization.

(b) Threatening employees with discharge if they engage in an economic strike.

(c) Refusing to bargain in good faith with the Union concerning wages, hours, and other terms and conditions of employment before making any changes in those terms and conditions of employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If requested by the Union, rescind any or all of the unilateral changes it made to unit employees' terms and conditions of employment, including those changes set forth in the new employee handbook issued in or about February 2003.

(b) Upon request, bargain in good faith with the Union regarding the changes described above.

(c) Make whole the unit employees for any losses suffered as a result of its unlawful unilateral changes. Backpay shall be calculated in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Corona, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 29,

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[1] In an election conducted on July 25, 2002, the unit employees selected Local 758, Hotel and Allied Services Union, SEIU, AFL–CIO as their collective-bargaining representative. The judge found that, prior to the election, the Respondent violated Sec. 8(a)(1) of the Act in various respects. No exceptions were taken to any of the judge's findings concerning preelection conduct found or found not to have violated Sec. 8(a)(1).

The judge also found that, after the election, the Respondent violated Sec. 8(a)(5) by making unilateral changes to unit employees' terms and conditions of employment. The judge found it undisputed that the Union had no prior notice of these changes. Although the Respondent did not specifically except to this finding, it contends in its brief that the Union did have notice. Contrary to the Respondent, the record clearly shows that the Union became aware of the changes only after they had already been implemented.

Member Schaumber notes that the Respondent did not except to any of the findings of 8(a)(5) violations on the ground that the unilateral change was too insubstantial to warrant a finding of a violation.

[2] We shall modify the recommended Order to specify the appropriate method of calculating backpay, to conform the Order to the violations found and the Board's standard remedial language, and to preserve the Union's prerogative to retain any unilateral changes it deems beneficial to the unit employees. See, e.g., *Bryant & Stratton Business Institute,* 327 NLRB 1135, 1154 (1999). We shall also substitute a new notice to conform to the recommended Order as modified herein, and in accordance with *Ishikawa Gasket America, Inc.,* 337 NLRB 175 (2001).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 14, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 27, 2004

____
Robert J. Battista, Chairman

____
Peter C. Schaumber, Member

____
Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT solicit grievances and promise or grant benefits to you for the purpose of dissuading you from voting for or supporting Local 758, Hotel and Allied Services Union, SEIU, AFL–CIO, or any other labor organization.

WE WILL NOT threaten you with discharge if you engage in an economic strike.

WE WILL NOT refuse to bargain in good faith with the Union concerning wages, hours, and other terms and conditions of employment before making any changes in those terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, if requested by the Union, rescind any or all changes we made to your terms and conditions of employment without bargaining with the Union, including the changes we made in the new employee handbook issued in or about February 2003.

WE WILL, upon request, bargain in good faith with the Union regarding the changes in terms and conditions of employment described above.

WE WILL make you whole, with interest, for any losses you suffered as a result of the unilateral changes described above.

RAMADA PLAZA HOTEL

Jonathan Chait, Esq., for the General Counsel.
Aaron C. Schlesinger, Esq., for the Respondent.
Kent Y. Hirozawa, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on June 25, 2003. The charge in Case 29–CA–25181 was filed on October 1, 2002, and the charge in Case 29–CA–25501 was filed on March 21, 2003. A complaint was issued on December 26, 2002, and a consolidated amended complaint was issued on May 29, 2003. In pertinent part, the consolidated amended complaint alleges:

1. That pursuant to an election conducted on July 25, 2002, in Case 29–RC–9852, the Union, on August 7, 2001 was certified in the following bargaining unit:

> All full-time and regular part-time housekeepers, house persons, drivers, laundry workers, and maintenance employees employed at the Employer's Corona facility, excluding all other employees, front desk employees, clerical employees, guards and supervisors as defined in the Act.

2. That on or about June 14, 2002, the Respondent, by Tony Marino and George Serrano, solicited grievances, impliedly promised to remedy such grievances and promised to reimburse medical expenses and lost wages resulting from on the job injuries.

3. That on or about June 14, 2002, the Respondent, in an effort to persuade employees to abandon their support for the Union, granted the following benefits:

(a) A lunchroom furnished with tables, chairs, a refrigerator, water cooler, sofa, television, and clock.

(b) A fan in the laundry room.

(c) A 15-minute breaktime in the morning and a 15-minute breaktime in the afternoon.

(d) Assignment of work to housekeeping employees of only one or two floors.

(e) Issued new vacuum cleaners.

4. That on or about July 2, 15, and 22, 2002, the Respondent threatened employees with the loss of employment and with unspecified reprisals if they chose to be represented by the Union.

5. That on or about July 22, 2002, the Respondent threatened employees with loss of employment.

6. That on or about July 26, 2002, the Respondent unilaterally instituted a new practice that required employees to change their clothes outside their working time and thereby unilaterally reduced their number of paid hours.

7. That on or about July 26, 2002, the Respondent unilaterally and without notice to or bargaining with the Union, instituted a new practice whereby it required employees to remain on duty beyond their normal working hours in order to receive time and half pay for each room cleaned in excess of 15 rooms per day. It is alleged that prior to July 26, the Respondent paid such premium pay even if extra rooms were cleaned during the employees' normal 8-hour day.

8. That in late January 2003, the Respondent by Antje Eichinger, its general manager, unilaterally and without notice to or bargaining with the Union, discontinued its practice of permitting employees to have a 15-minute break in the morning and a 15-minute break in the afternoon.

9. That in late February 2003, the Respondent, without notice to or bargaining with the Union, distributed a new employee handbook that made the following unilateral changes:

(a) Prohibited employees from using personally owned locks on their lockers.

(b) Prohibited employees from removing their uniforms from the facility and made the Respondent responsible for the cleaning and repairing of uniforms.

(c) Prohibited employees from punching in more than 6 minutes before the start of their shifts.

(d) Required full-time employees to work an average of 40 hours per week and provided that they would convert to part-time status if they worked less than an average of 21 hours per week in 2 consecutive weeks.

(e) Granted one personal day off per calendar year.

(f) Defined the accrual of sick leave to be a maximum of 3 days per calendar year and created new rules and penalties governing the use of sick leave, for example by excluding part-time employees from sick leave benefits and restricting sick leave from being used in increments of less than a full workday.

(g) Eliminated providing for holiday pay on a religious equivalent of Christmas day.

(h) Described vacation leave in increments of weeks and eliminated the ability of employees to carry over unused vacation leave to the next year.

(i) Permitted employees to take up to 2 unpaid hours to vote in elections if polls are not open during the employee's regular off duty hours.

(j) Provided a separation policy requiring 2 weeks written notice of resignation.

(k) Instituted a drug and alcohol testing program.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Preelection Activity

The Union began organizing employees of the Company in or about June 2002. Thereafter, it filed a petition for an election in and pursuant to a Stipulated Election Agreement executed on, an election was conducted on July 25, 2002. As a majority of the employees voted for representation, the Union was certified as the exclusive bargaining representative on August 7, 2002 in the unit described above.[1]

Dolores Munoz testified that in June 2002, the Respondent's management, Tony Marino and George Serrano, held a meeting with the employees to discuss unionization. Her testimony was not challenged and therefore is taken as correct.

At the June meeting, Marino said that he was there to hear all of the problems and to see if he couldn't find out how to resolve them. He said that this was the opportunity that the employees had to speak about all of their problems. An employee named Miledi explained that the employees were working on four and five different floors in the course of 1 day. (The hotel has eight floors and about 35 rooms per floor.) Another employee, Beverly, said that employees didn't have a place to eat lunches. She said that they didn't have a refrigerator and didn't have a microwave to heat their food. She also complained that the employees didn't have enough vacuum cleaners. Employees Luba and Nisveta complained that the laundry was too hot and had no ventilation. Nisveta and Munoz also said that the employees needed more breaks during the workday. Munoz complained that a year earlier, she had injured herself on the job, that her hospital bills were unpaid, and that she had lost about 10 days' pay due to her absence from work. Finally, another employee, Venecia Gonzales said that she had broken a toe, had lost work, and had not had the bills paid.

In response to the complaints, Serrano said that that he was going to give the employees a 15-minute break in the morning and a 15-minute break in the afternoon. (This in addition to the half hour lunchbreak that the employees already had.) He also

[1] Although not relevant to the issues in this case, the Respondent wished to note that although the unit description included drivers, there were no drivers employed at the time of the election.

told Munoz that he would make sure that her bills were paid and that he was going to pay her for her lost days. In response to Venecia Gonzales' recitation of her injury, Serrano passed around a sheet of paper so that all of the employees could write down the accidents that they had incurred on the job.

According to the uncontradicted testimony of Munoz, on the day after the meeting, she was assigned to work on only two floors and this continued thereafter. In addition, she testified that the Company set up a lunchroom in the basement that had tables and chairs along with a refrigerator, microwave, television, and a sofa. Munoz also testified that the Company installed a large fan in the laundry room.

Munoz testified that several days later, the employees were told that they would be allowed to take a 15-minute break in the morning and a 15-minute break in the afternoon. She also testified that new vacuum cleaners were purchased and arrived at the hotel.

According to Munoz, sometimes later in June 2002, Mitchell told her that he had paid her hospital bills in relation to the job-related injury.

On July 2, 2002, the Respondent sent a letter to the employees concerning the upcoming election. This stated in pertinent part:

> Please DON'T WASTE YOUR HARD-EARNED MONEY on this union and get nothing in return. It is because they want to get $38 a month from each of you that they are trying to get a foothold here at the Ramada Plaza. We strongly believe that no union is necessary and that Local 758 would only be harmful to the special relationship that we now enjoy.
>
> Remember, the union can get you nothing unless we, the Employer agree to it. Please don't vote to bring in an outsider to come between us. You have a good salary and benefits and we have had a good relationship up until now—and we would hate to have it ruined.

On July 15, 2002, the Company sent another letter to the employees. In pertinent part this stated:

> As you know, the union election will take place on Thursday, July 25, 2002. And, by now, you must have run into the union organizers. They often like to bother you at lunch hour, before or after work or at home. We don't think these tactics are necessary.
>
> . . . .
>
> Here are some questions you may want to ask the union "salesman" before the election. (We bet that he won't give you any honest answers.)
>
> . . . .
>
> 6. Could you lose your job if the union makes you go out on economic strike? (The answer is—YES.)

According to Munoz, in July, the Company held another meeting, which the employees were required to attend. She testified that there was a man who introduced himself as Steve and described himself as one of the owners. This Steve told the assembled employees that there was going to be an election and that the employees have to think about that because the Union requires the workers to make strikes. She testified that Steve said that if there was a strike, the employees could lose their jobs. Munoz also states that he said that if the employees struck, the law allowed the Company to take new employees because they had to clean the hotel.

B. Postelection Activity

As noted above, the election was held on July 25 2002, and the Union obtained a majority of the votes cast. Because no objections were filed, the Union was certified on August 7, 2002.

The General Counsel alleges that the Respondent, after the election made certain unilateral changes in the terms and conditions of the represented employees and did so without offering to bargain about these changes with the Union before they were instituted. Below is a description of the various changes made, and there is no dispute that these were made without prior notice to or prior bargaining with the Union.

On July 26, 2002, the day after the election, the employees were told that from now on, if they wanted to get paid extra for cleaning more than the 15-room quota per employee during the normal workday, they would have to remain on duty past their normal worktime so that the extra time would be accounted for by actually clocking out. That is, before this change, if an employee cleaned, for example 17 rooms during her normal 8-hour day, she would be paid for an extra hour that day even though she didn't have to actually be on the premises for the extra hour. Now, however, she would have to remain on the premises and clock out after being present during the extra hour. Thus, the inducement to work harder during one's normal workday was eliminated, as was the ability of employees to earn extra money within the normally allotted time.

Also, on or about July 26, the employees were notified that they no longer could change into their work uniforms before clocking into work. Additionally, they were told that they would have to change back into their civilian clothes after clocking out. The latter change was eliminated after a couple of weeks, but the employees still were required to change into their uniforms before punching in on the timeclock.

In January 2003, the employees were informed that the 2 15-minute breaks that had been granted to them before the election were being rescinded. They were told that this rescinded benefit would be replaced with a personal day off.

In or about February 2003, the Respondent distributed a new employee handbook, which made certain changes in its employees' working conditions and benefits. Some of these changes were trivial, but others were of more substance. As to the more substantive changes, some were detrimental to the employees whereas as some were more beneficial. The changes contained in the new handbook, which the General Counsel alleges to have been unilaterally made, are as follows:

Whereas previously, the employees could use their own locks, the new handbook prohibited this and required employees to use company owned locks for their lockers.

Whereas employees had previously been responsible for cleaning and repairing their own uniforms, and were allowed to take them home for that purpose, the new handbook prohibited employees from taking their uniforms home and provided that the uniforms would henceforth be cleaned and repaired by the housekeeping department.

Whereas employees had previously tended to punch in 10 to 15 minutes prior to the start of their shifts, the new handbook stated that employees would be subject to discipline if they punched in more than 6 minutes prior to the start of their shift. (In the previous practice, employees were not paid for the extra time, but they were not subject to discipline for punching in early.)

Whereas the previous handbook stated that the normal workweek would be 37-1/2 hours for full-time employees, allowing for a half hour meal period, the new handbook stated that full-time employees would be expected to work an average of 40 hours per week. The new handbook also defined a full-time employee as one who works less than an average of 21 hours per week for 2 consecutive quarters. (In terms of the workweek, it should be noted that the 37-1/2 hour workweek with the half hour meal period, is the same as a 40-hour workweek and the Respondent asserts that in this respect there was no change at all.)

Whereas previously, employees did not have a personal day off, the new handbook states that each employee has one personal day per year to be used at their convenience.

The previous handbook provided that sick leave is accrued at 1/4 day per month of continuance employment and there was no prohibition on employees carrying over unused leave into the following year. Additionally, the old handbook allowed part-time employees to be eligible for sick leave and permitted the use of sick days in less than full day increments. The new handbook states that employees accrue sick leave at 3 days per month and that they cannot be carried over to the next year. Additionally, the new handbook provides that part-time employees are not eligible for sick leave and that sick days must be used in full day increments.

Whereas the old handbook included a paid holiday for Christmas or for a religious equivalent, the new handbook's list of holidays included Christmas but does not allow for an equivalent.

The old handbook allowed 5 days of vacation after 1 year; 10 days after 3 years; and 15 days after 5 years. The new handbook provides that employees are entitled to 1 week after 1 year; 2 weeks after 3 years; and 3 weeks after 5 years. Since the Company has always defined a week as being 5 days, the benefit is the same, albeit described in a different way.

The old handbook had no provision for jury duty, whereas the new handbook provides that an employee who serves jury duty will receive the difference between her regular earnings and the jury duty fee.

The old handbook had no provision for time off to vote, whereas the new handbook gives employees up to 2 hours off for the purpose of voting if the voting polls are not open during an employee's off hours.

The old handbook had no provision requiring employees to give notice before quitting, whereas the new handbook purports to require an employee to give 2 weeks' notice before resigning. (I am not sure how such a rule would be enforceable.)

Whereas the old handbook had no provision for rehiring, the new handbook states that employees who have resigned in good standing will be considered if they seek reemployment.

Whereas previously there was no provision or practice regarding drug or alcohol testing, the new handbook contains such a policy.

III. ANALYSIS

A. The Preelection Allegations

The testimony shows that in June 2002, management held a meeting with employees to discuss unionization and that Marino told employees that this was the opportunity for the employees to speak about all of their problems. In response to complaints about work scheduling and other conditions of employment, the Company promised to give the employees 15-minute breaks in the morning and afternoon, in addition to their existing half hour lunchbreak. On the following day, the Company told the employees that they would be assigned to do only two floors per shift. Additionally, a fan was installed in the laundry room, and a lunchroom was set up which had a refrigerator, microwave oven, television, sofa, etc. New vacuum cleaners were also issued.

These actions by the Respondent constituted illegal grants of benefits inasmuch as they were made at a time when an election petition was pending and therefore, it must be presumed, in the absence of evidence that they were part of an existing practice or that they were planned beforehand, as being designed to influence the outcome of the election. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (l963); *Baltimore Catering Co.*, 148 NLRB 970 (l964). Further, these actions also constituted violations of Section 8(a)(1) under the theory that they were an illegal "solicitation of grievances" when accompanied by either the promise of, or the granting of benefits to resolve such grievances, in the context of an election or union organizing campaign. *Fast Food Merchandise*, 291 NLRB 897, 906 (1988); *A.J.R. Coating Division Corp.*, 292 NLRB 148, 163 (1988); *Uarco, Inc.*, 286 NLRB 55 (1987).

The General Counsel also alleges that the Respondent violated the Act when it promised to reimburse employees for lost wages and medical bills incurred from workplace injuries. One might assume that such promises were merely consistent with what the Company was obligated to do under New York State's Workers Compensation law. Nevertheless, the Respondent did not present any evidence that these promises were made because it was required to do so under State law and therefore, I cannot say that it has overcome the presumption that the promises made at a time when the election was pending, was designed not to influence its outcome. Therefore, I shall conclude that the Respondent violated Section 8(a)(1) of the Act.

The General Counsel alleges that the Respondent made threats of reprisal. He contends that these threats were made orally at a meeting in July 2002, and in two memoranda that were distributed to employees.

The July 2 memorandum reads:

> Please DON'T WASTE YOUR HARD-EARNED MONEY on this union and get nothing in return. It is because they want to get $38 a month from each of you that they are trying to get a foothold here at the Ramada Plaza. We strongly believe that no union is necessary and that Local 758 would only be harmful to the special relationship that we now enjoy.

> Remember, the union can get you nothing unless we, the Employer agree to it. Please don't vote to bring in an outsider to come between us. You have a good salary and benefits and we have had a good relationship.

With respect to the July 15 memorandum, the General Counsel contends that this constitutes a threat of job loss when it stated: "Could you lose your job if the union makes you go out on economic strike? (The answer is—YES.)"

As to the meeting, the evidence shows that the employees were told by an owner that if there was a strike, they could lose their jobs and/or that if the employees struck, the law allowed the Company to take new employees because they had to clean the hotel.

With respect to the remarks about strikes, both the Board and the Courts have allowed an employer to hire permanent replacements for employees who engage in an economic strike. *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938);[2] *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). Thus, even though some employees may wind up losing their jobs because of their union or concerted protected activities, this is not construed as being illegal because of an employer's perceived need and corresponding right to continue its business operations in the face of an economic strike.

In *Eagle Comtronics, Inc*., 263 NLRB 515, 516 (1982), the Board held that an employer does not violate the Act if it merely states to employees what the law is; that strikers can be replaced by permanent replacement. However, in *Baddour, Inc*., 303 NLRB 275 (1991), where the Employer's statements about permanent replacements make specific reference to job loss, the Board has viewed them as being unlawful. The phrase "lose your job," conveys to ordinary employees the message that employment will be terminated. If reference to permanent replacement is coupled with a threat of job loss, "it is not reasonable to suppose that the ordinary employee will interpret the words to mean that he/she has a *Laidlaw* right to return to the job." See also *Larson Tool & Stamping Co*., 296 NLRB 895; *Sygma Network Corp*., 317 NLRB 411 (1995). In addition, statement should be viewed in context of other threats if made. *Duramax Inc*., 307 NLRB 213 (1982); *Mediplex of Danbury*, 314 NLRB 470, 471 (1994); *Mack's Markets, Inc*., 288 NLRB 1082 fn. 3 (1988); *Gino Moreno*, 287 NLRB 1327 (1988).

In cases of this kind, difficult credibility issues may arise because employees, in my experience, have honestly believed that what they heard was that they would be fired, even though told otherwise lawful statements to the effect that the Employer can permanently replace economic strikers. And since in many instances, permanently replaced employees never do manage to get their jobs back, such an interpretation of what was said, is quite foreseeable and reasonable.[3]

Nevertheless, we do not have a credibility problem in this case, inasmuch as the written statements made by the Respondent explicitly states that if the employees engage in a strike, they could lose their jobs. This statement is not qualified in any way and in this respect, I conclude that the Respondent has violated Section 8(a)(1) of the Act.

With respect to the statements in the July 2 memorandum, the General Counsel relies on *Storktowne Products,* 169 NLRB 974, 979 (1968). In that case the administrative law judge, in a context where numerous other violations occurred, held that the Respondent illegally threatened employees with reprisals when in a speech, its manager stated:

> [Unions] cannot guarantee us anything except trouble. We are firmly convinced that if a union were to get in here, it would work to our serious harm, yours and mine. This union would be a source of trouble, strife and misunderstanding. It would turn our now warm relationship into a cold and formal thing. Unions do not like for management and employees to have a warm relationship or to get along well together and we know the union's fear of friendly dealings between you and your management . . . . They [i.e. unions] solve your problem? Sure they do, most of the problems you wouldn't have to begin with if the union wasn't there . . . . Would we get along as well together if an iron curtain dropped between us. I do not believe this union could solve any problems real or imagined which we may have in this shop, any more than you could solve your problems at home by calling in your mother-in-law to straighten out your affairs. This is a serious matter. If you think a union would bring trouble to us, as I sincerely do, you can express yourself and work against this union regardless of whether you signed a union card or not . . . .

In my opinion, the statements in the Respondent's July 2 memorandum, although close to the edge, are not like the overheated rhetoric contained in the *Storktowne* case, particularly with respect to the latter's references (to the iron curtain), implying that the selection of a union would be unpatriotic.

[2] In *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938), the Court found that the Employer had violated Sec. 8(a)(3) when it refused to reinstate certain of the strikers, not because they had been replaced, but because they were the most active union supporters. The Court's opinion assumes without explication, that an employer may hire permanent replacements, finding however that this was not the reason for the refusal to reinstate some of the strikers.

[3] The balance set between the right of employees to engage in economic strikes without loss of their employment status and an employer's contrary right to continue operating its business by using permanent replacements appears to be based on a number of assumptions about which there is little or no empirical evidence and which might therefore be a suitable subject for research. For example; to what extent, if any, are potential workers reluctant to work as temporary strike replacements as opposed to taking such jobs on a permanent basis? With the growth of contingent workers and temporary employment companies, and the lessening of any social stigma for crossing picket lines, is it true that employers faced with an economic strike cannot find temporary replacements without offering permanent positions? When permanent replacements are hired, what is the average time that strikers are reinstated after making an unconditional offer to return to work? To what extent, if any, are economic strikers never reinstated after permanent replacements are hired? Is there any rational and empirical justification for changing the present rules so that economic strikers, even if replaced, are guaranteed reinstatement, if not immediately, then within some specifically defined period of time after an offer to return has been made? (Perhaps 6 months.)

Moreover, the Respondent's statements should be read in the total context of the July 2 memorandum, which essentially makes a legally accurate assertion that any new benefits achieved through a union, must come as a result of negotiations. Therefore, in this respect, I shall recommend that the allegation in the complaint relating to the July 2 memorandum be dismissed.

B. Postelection Unilateral Changes

Once the Union won the election, and in the absence of valid objections to the election, it attained the status of exclusive bargaining representative. As such, the relationship between the Employer and its employees changed so that instead of being allowed to deal directly with its employees, the Respondent was now required by law to first notify and offer to bargain with the Union before making any changes in the existing terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1961). In this regard, an employer violates Section 8(a)(5) of the Act if, in the absence of a legitimate impasse, it makes changes (for better or worse), in the existing wages, hours, or other terms and conditions of employment, without first notifying and offering to bargain with the Union unless the change is insubstantial. *Murphy Diesel Co.,* 184 NLRB 757 (1970), enfd. 454 F.2d 303 (7th Cir. 1971).

The Respondent's obligation to bargain before making changes commences not on the date of the certification, but on the date of the election. Thus, in *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), the Board held that where an employer's objections to the election have been rejected, the bargaining obligation commences as of the date of the election. The Board stated; "Absent compelling economic circumstances for doing so, an employer acts at its peril in making changes in the terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made." See also *Han-Dee Pak*, *Inc.,* 253 NLRB 898 (1980), for the same result where challenged ballots were at issue and delayed the issuance of a certification.

The Respondent's assertion that no violation can occur if the Union failed to ask for bargaining *after* a change has been made, is simply not the law.

The Respondent made a series of unilateral changes in terms and conditions of employment without first giving notice to or bargaining with the Union. Those changes which I have concluded violate Section 8(a)(5) and (1) of the Act are as follows:

On or about June 26, 2002, the Respondent changed a method of paying employees for cleaning extra rooms within their normal work hours by eliminating a half hour bonus for each extra room cleaned.

On or about June 26, 2002, the Respondent changed the existing practice and required employees to change into their uniforms before clocking in for work and required them to punch out before changing into their civilian clothes.

In or about January 2003, the Employer eliminated the two 15-minute breaks that it had instituted before the election. The fact that the institution of these breaks originally was an illegal grant of benefit to affect the results of the election, does not detract from the fact that by the time of their elimination, they had become an established term and condition of employment. (Nor might I add, would a remedy for the illegal grant of benefit, require the Respondent to eliminate the benefit granted.)

In February 2003, the Respondent issued a new employee handbook which in certain material ways, changed the terms and conditions of employment. Among the unilateral changes were (a) the institution of a penalty if employees clocked in more than 6 minutes prior to the start of their shifts; (b) the granting of a personal day off; (c) changes in the accrual of sick leave and the ability to carry over unused sick leave; (d) a change in holidays by eliminating the ability of employees to have an equivalent to Christmas; (e) the granting of jury duty and voting time off; (f) the establishment of a drug and alcohol testing program; and (g) a change in the definition of who is a part-time employee along with the elimination of sick leave for part-timers.

CONCLUSIONS OF LAW

1. By soliciting grievances and by promising and granting benefits to its employees for the purpose of dissuading them from voting for or supporting Local 758, Hotel and Allied Services Union, SEIU, AFL–CIO, the Respondent has violated Section 8(a)(1) of the Act.
2. By threatening employees with discharge and reprisal if they supported the Union or engaged in an economic strike, the Respondent has violated Section 8(a)(1) of the Act.
3. By making unilateral changes in the terms and conditions of employment without giving the Union prior notice and an opportunity to bargain, the Respondent has violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as I have concluded that the Respondent has made certain unilateral changes with respect to terms and conditions of employment, I shall recommend that it return to its preexisting practices and that it bargain until agreement is reached or until the parties reach a good-faith impasse. In this regard, since the new employee handbook issued in February 2003, contains many of the changes, it is recommended that it be withdrawn in its entirety, and that any and all changes from the preexisting handbook be subject to bargaining.

Further, I shall recommend that any employees who were adversely affected by the various unilateral changes be made whole for any loss of wages they may have suffered. Interest on the amounts is to be computed on a quarterly basis in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Ramada Plaza Hotel, its officers, agents, successor, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances and promising or granting benefits to its employees for the purpose of dissuading them from voting for or supporting Local 758, Hotel and Allied Services Union, SEIU, AFL–CIO, or any other labor organization.

(b) Threatening employees with discharge and reprisal if they support the Union or engage in an economic strike.

(c) Refusing to bargain in good faith with the Union concerning wages, hours, and other terms and conditions of employment and before making any changes in those terms and conditions of employment.

(d) In any like or related manner interfering with employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revoke the changes found to have been made without bargaining and revoke the new employee handbook that was issued in or about February 2003.

(b) Upon request, bargain in good faith with the certified collective-bargaining representative regarding the changes described above.

(c) Make whole any employees affected by the unilateral changes in the manner described in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Corona, New York, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 14, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 17, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit grievances and promise or grant benefits to our employees for the purpose of dissuading them from voting for or supporting Local 758, Hotel and Allied Services Union, SEIU, AFL–CIO, or any other labor organization.

WE WILL NOT threaten employees with discharge or reprisal if they support the Union or engage in an economic strike.

WE WILL NOT refuse to bargain in good faith with the Union, concerning wages, hours and other terms and conditions of employment before making any changes in those terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL upon request, bargain with the certified representative about the changes in the terms and conditions of employment described above.

WE WILL make our employees whole, with interest for any loss of earnings that they may have suffered as a result of the unilateral changes described above.

RAMADA PLAZA HOTEL

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."